ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DAVID M. GLOVER, JUDGE

DIVISION III

CACR06-853

March 21, 2007

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT
[CR-2001-978-B]

MICHAEL D. DYKES
APPELLANT

V.

HONORABLE NORMAN WILKINSON, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

In 2002 and 2005, appellant, Michael Dykes, pleaded guilty to several underlying drug-related offenses for which a portion of his sentencing involved suspended impositions of sentence. The terms of his suspended sentences included the condition that he was not to violate any laws. On March 15, 2006, the State filed its petition to revoke, asserting that appellant had committed the offense of rape on January 20, 2006, in violation of the terms and conditions of his suspended sentences. On May 3, 2006, a hearing was held on the petition. Following the hearing, the trial court found that the State had met its burden of proving that it was more likely than not that appellant had committed the offense of rape. The trial court therefore revoked appellant's suspended

sentences and sentenced him to five years in the Arkansas Department of Correction. The point raised by appellant in this appeal is that the "trial court erred in denying the appellant's calling of the victim's mother as a witness who was expected to testify that the victim had made false accusations against others in the past." We affirm.

In a probation-revocation hearing, the State must prove its case by a preponderance of the evidence. *Haley v. State*, 96 Ark. App. 256, ____ S.W.3d ____ (2006). To revoke probation or a suspension, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309 (Supp. 2001). The State bears the burden of proof, but needs only to prove that the defendant committed one violation of the conditions. *Haley, supra*. When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Id*. Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id*. Because the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position in these matters. *Id*.

A.C., the rape victim in this case, testified that she was born on January 15, 1990, and that she was sixteen years old on January 20, 2006. She stated that she was at her cousin Terri's house on that date; that Terri invited appellant and his wife, Crystal, to come over with their kids; that Terri and Crystal "went and bought alcohol"; and that they were all drinking. She testified that she had three big glasses of vodka and orange juice

and that, when she talked by telephone with her mother and sister, they both told her she sounded drunk and they were coming to get her. She said that she started crying because she knew that she was in trouble and that appellant was sitting beside her and told her to go outside with him to get some fresh air. A.C. explained that she and appellant went outside between 8 and 9 p.m. and that it was dark. She said that they walked into an adjacent big field and she fell; that appellant helped her up the first time, but when she fell again, he got on top of her, undid her pants and his pants, and then stuck his penis into her vagina. She stated that "this went on for about 20 minutes" and that she kept telling him, "no," but that he did not listen to her.

A.C. recounted that the episode ended when she heard her sister and Crystal yelling at each other; that she screamed her sister's name; that appellant got up; that she walked back to the apartment with her pants unbuttoned; that her sister saw her and called the police; that she saw appellant again, walking toward the apartment; that she stayed outside until the police arrived and she told them what happened; and that she then went to the rape-crisis center.

During appellant's cross-examination of A.C. at the revocation hearing, defense counsel asked, "Have you accused somebody of doing this to you before?" Before A.C. answered, the State objected based on relevancy. Defense counsel responded in part: "It certainly is relevant, Your Honor. If she wrongfully accused somebody of rape, it's exculpatory." The trial court sustained the objection and counsel then questioned A.C. about other matters. Thus, no answer to the question was ever given.

At the close of the State's case, the following colloquy occurred:

[DEFENSE COUNSEL]: One of the things you have already ruled on and one of the things that I intended to do was call the victim's mother and I was going to ask her if [A.C.] has made a false accusation about somebody else because it is my belief that she has, and that Arkansas law would allow evidence of that type. False accusation is admissible because it goes toward whether or not the State is proving their case beyond a reasonable doubt and it's also exculpatory. I believe that case is *West v. State* and it seems like, based on my recollection, that was a case involving sexual abuse on a minor child and that minor child had told somebody else that this had happened to him before and it was found to be false. And I was intending to bring out through the testimony of the victim's mother that she had falsely accused somebody, had a medical examination and was found to be a virgin and I intended to explore that either by direct or cross-examination if she was called by the State. I am asking the court to reconsider its ruling on whether or not I should be allowed to do that because we feel like it goes towards whether the State has met their burden in this case and it's also exculpatory evidence.

[PROSECUTOR]: I object to that. It's irrelevant, that is more than irrelevant in the fact that she passed the lie detector test concerning this incident. That's not admissible and we would object.

[DEFENSE COUNSEL]: It would certainly go to her veracity.

[PROSECUTOR]: We've got no way of knowing if it was false. The fact that she made some prior allegation wouldn't prove a negative.

[THE COURT]: It seems to me it would be relevant, but I am not going to permit it. I think that it would, the prejudicial effect outweighs the probative value. But, I will permit you

to make any off of proof you want here to put on the record the evidence.

[DEFENSE COUNSEL]: *The evidence would be that the mother, I would ask her, and it is my belief based upon my investigation that her daughter had accused another person of rape. That person was accused by [A.C.] of raping her. An examination was done by a doctor and the doctor said she couldn't have been raped because she was in fact a virgin. That would be the testimony.*

[THE COURT]: Well, I am not going to permit it. I don't think it is appropriate.

[DEFENSE COUNSEL]: *Well, the evidence would be that I would call the victim's mother and ask her if that's what happened in the case. She should know whether or not the daughter had falsely accused somebody.*

(Emphasis added.)

As a preliminary matter, to the extent that appellant challenges in this appeal the sufficiency of the evidence to support his revocation, we hold that the trial court's finding that appellant violated the terms of his suspended sentence by committing the offense of rape is not clearly against the preponderance of the evidence. As stated earlier, evidence that is insufficient for a criminal conviction may be sufficient for a revocation, *Haley, supra*, and, even with respect to a criminal conviction, a victim's uncorroborated testimony provides sufficient support. *Talbert v. State*, 367 Ark. 262, ____ S.W.3d ____ (2006).

Appellant's primary contention in this appeal is that the trial court erred in refusing to allow him to present testimony from A.C.'s mother concerning whether or not A.C.

had ever made false allegations of sexual assault in the past. However, he makes no argument in this appeal concerning the trial court's adverse ruling during his cross-examination of A.C., focusing instead on the trial court's refusal to allow him to call A.C.'s mother as a witness. We find no error.

Appellant's proffer of testimony, which was fully quoted above, was merely his stated expectation that A.C.'s mother would testify that A.C. had accused another person in the past of rape and that the medical evidence was that she was in fact a virgin and had not been raped. But as noted by the State in its brief, the proffered testimony would not have established that A.C. falsely accused the other person because the offense of rape also includes deviate sexual activity. The establishment of A.C.'s virginity based upon a medical examination would not establish that she had not been the victim of deviate sexual activity, and therefore would not establish that her previous allegation was false. Consequently, we find no error in the trial court's determination that the probative value of the testimony was outweighed by its prejudicial effect and that it should therefore be excluded.

Both at trial and in this appeal, appellant relied upon the case of *West v. State*, 290 Ark. 329, 719 S.W.2d 684 (1986). The case is of no help to appellant because it was superseded by a 1993 amendment to the rape-shield statute, which was not mentioned below. While the applicability of the rape-shield statute in a revocation situation is not certain, it is not necessary for us to delve into that issue in the instant case because it was not addressed below, and appellant did not abide by the proscribed statutory steps in the

1993 amendment. Even though no mention of the rape-shield statute was made below, and the procedures outlined therein were not followed, the trial court tentatively stated that he thought the evidence was relevant; and the court did apply the ultimate balancing test encompassed in the rape-shield statute concerning whether the probative value of the offered proof outweighs its prejudicial nature. The trial court found that it did not, and we find no error in that conclusion.

Affirmed.

MARSHALL and BAKER, JJ., agree.